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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

ELIZABETH OZERSON

on Habeas Corpus.

B204725

(Los Angeles County  
Super. Ct. Nos. A815403, BH004851)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus, Steven R. Van Sicklen, Judge. Affirmed.

James W. Whitehouse for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman and Lora Fox Martin, Deputy Attorneys General, for Respondent.

In 1987, Elizabeth Ozerson was sentenced to a term of 15 years to life for second degree murder, plus a 2-year enhancement for personal use of a handgun. In April 2007, the Board of Parole Hearings (Board) found Ozerson unsuitable for parole.<sup>1</sup> Ozerson has filed a petition for writ of habeas corpus contending that she has been denied due process because no evidence supports the Board's conclusion that she would currently pose an unreasonable risk of danger to public safety if released on parole. We disagree and deny the petition.

## **BACKGROUND**

### **A. Commitment Offense**

The facts are drawn from the transcript of the parole hearing, during which the presiding commissioner read into the record the Court of Appeal opinion affirming the trial court judgment. (*People v. Ozerson* (Oct. 3, 1988, B028634) [nonpub. opn.] )

Ozerson married her husband Ray in 1975. The first part of their marriage was spent in Germany, where Ray was stationed in the armed forces. The couple came to California prior to 1979 and resided in Encino.

In May 1979, Ray accidentally sustained a gunshot wound to the head while cleaning his Smith & Wesson revolver. Ray had no memory of the incident due to the nature of the injury. Ozerson has said she was in the shower when it happened. She said Ray had been drinking and had insisted she give him his weapon cleaning kit.

Ozerson attempted to care for Ray, who made substantial progress in his recovery and was able to walk with a cane. He had been a futures trade investor at the time of his accident, then changed professions, becoming a computer programmer, analyst and consultant. There was testimony that he had a very positive outlook on life.

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<sup>1</sup> The Board found Ozerson suitable for parole in 2004. The Governor reversed the decision.

In the summer of 1981, Ozerson was working for an insurance company when she met an older man, Bert Kreisberg, in the office building. The two began an affair.<sup>2</sup>

In 1983, the Ozersons bought a home in Tarzana. One witness described their neighborhood as a “good, quiet neighborhood.” Ozerson continued living with Ray, but spent most of her free time with Kreisberg. It appears that Ray did not know about the affair for a long time, despite Ozerson’s frequent absences from home and her claims that she was working overtime.<sup>3</sup> Ozerson and Kreisberg traveled to Europe together several times, and she introduced him to her relatives in Scotland. The two socialized as a couple with other couples, even accompanying one couple to Las Vegas for that pair’s wedding in 1985.

Kreisberg was a social visitor at the Ozersons’ home. For a while, Ray and Kreisberg ran an insurance business together. During that time, the Ozersons obtained a number of insurance policies from Jefferson National Life Insurance Company. The amount of coverage on Ray’s life was \$240,000; Ozerson’s life was insured for a substantial amount as well.<sup>4</sup>

Ozerson was upset that Kreisberg continued to see other women, but she resisted his pleas that she leave Ray for him. Ozerson was conflicted and insisted that although she loved Kreisberg, she also loved Ray and did not want to walk out on a disabled man.

In December 1986, Ozerson told Kreisberg she was ready to leave Ray. Kreisberg bought two tickets to Switzerland for the 17th of December. Ozerson assured Kreisberg

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<sup>2</sup> Kreisberg was then separated from his wife. They divorced in 1982.

<sup>3</sup> At the parole hearing, Ozerson said: “He asked me once. He saw me getting out of [Kreisberg’s] car and he asked me, was I out with him that day, and I lied and I said no. And then eventually, later on, I told him, yes, I had seen him that night and we had gone to dinner.”

<sup>4</sup> The Ozersons’ annual insurance premium was \$1,283.20.

that she would move out of the Tarzana residence by then. At first, she said she would move out on the 8th, but made an excuse, putting off the move until the 9th, and then until December 10th.

On December 10, 1986, the Ozersons were at home early in the morning. A number of the neighbors testified at trial that they saw Ozerson walking her dog after 7:30 a.m., later than her usual 7:00 a.m. walk. No one heard any gunshots.

As she returned home at about 7:45 a.m., Ozerson greeted Daniel Hale, her neighbor Ann Ostrander's son-in-law, who was dropping off his infant son with Ostrander on his way to work. Moments later, Ozerson came running out of her backyard and said there was a man in her house and that Ray was inside. She was holding the dog leash and had the dog with her. Hale said the dog appeared calm.

Hale brought Ozerson into the Ostrander home to call the police. Ms. Ostrander dialed "911" and summoned the police. Ozerson said, "I wonder what happened with Ray?" She also said, "My God, his car is out there," referring to Ray's car, which Ms. Ostrander could not see. Ozerson continued to express concern about her husband and wanted to go back into the house, but was persuaded to wait for the police.

Hale went outside and looked around, but did not see or hear anyone departing from the Ozersons' residence. He looked in the Ozersons' backyard and could see that a sliding door in back was open about 12 inches. He ascertained that the gate on the far side of the house appeared to be locked and that Ray's car was parked on that side of the driveway.

Los Angeles Police Officers Webb and Panek responded to the 911 call at 7:54 a.m. Officer Webb entered through the back sliding door of the Ozerson residence and observed a man lying on the floor in a pool of blood. He radioed for emergency medical care. Los Angeles paramedic Gocke arrived at 8:05 a.m. and examined the body. He noted no vital signs. Gocke observed a ring on the decedent's finger.

Ozerson had described the man she had seen in the house as Hispanic, about 5 feet 9 inches tall, medium build, wearing a dark cap and dark clothing. Officer Webb, accompanied by Officers Johnson, Panek, and Kolb, searched the home thoroughly for the suspect, but found no one. Webb looked for evidence of escape. The grass in the yard was wet, but there were no footprints or impressions to indicate that someone had departed through the yard. Police Officer Maureen Conway, now at the scene, informed Ozerson at the Ostrander home that her husband was in the house, dead. Ozerson was hysterical. Officer Conway asked Ozerson if she would go to the station to assist in the investigation. Ozerson seemed anxious to cooperate and agreed to go to the station accompanied by Ms. Ostrander's daughter, Susan Barton.

Conway, Ozerson, and Barton arrived at the West Valley Police Station. Detective Hart took Ozerson and Barton into an interview room. A police officer conducted a gun residue test on Ozerson, which came back negative. A pair of brown gloves belonging to her also tested negative for gunshot residue.

Ozerson was interviewed during the morning of December 10, then at length by Detective Dolley in the afternoon. Dolley advised her of her rights, which she waived. At various times, detectives told Ozerson untrue things to test her reaction. At one point, she was told she had tested positive for gunshot residue (she had not). She quickly explained that she had shot the family gun in the air in the backyard the night before the killing, on December 9th.

Detectives Dolley and Hart went out to the Ozersons' house to investigate. There was no sign of forced entry into the residence. Ray's body was in the family room area of the house. His cane was lying parallel to his body. In addition to his ring, Ray was wearing a watch on his left wrist and had \$66 in his right pocket. There were no signs of a struggle. The detectives found a briefcase on the floor with a zippered clutch bag beneath it. Various items were positioned on the floor around the briefcase in a circle, seemingly staged. The only place in the house where there appeared to have been any activity was in the office. Desk drawers and a filing cabinet drawer were open, and

papers were strewn about the floor. Detective Dolley testified that in his experience, burglars usually go directly to residential bedrooms to check drawers for women's jewelry and men's wallets. There was no sign of such activity in the Ozerson house. Ozerson's jewelry was undisturbed. No effort had been made to take stereos or televisions, and the detectives noted there was no "exit plan." Experienced burglars typically open a door or two for an escape route in case they need to leave in a hurry. The detectives also observed that Ray had been shot multiple times. A fleeing burglar, in their experience, would not engage in such overkill. The detectives noted Ray's car in the driveway, another anomaly, because most burglars avoid residences that appear to be occupied or at least they test the doorbell first.

The detectives searched for Ray's gun, but did not find it in the bedroom nightstand. They did find a pink towel with what appeared to be a gun imprint on it. Gunshot residue was found on the towel, but not, as noted, on Ozerson, her clothing, or her brown gloves. Gunshot residue was later found on each glove of a pair of gray gloves belonging to Ozerson, which Ms. Ostrander found in her home at different times after the crime. One glove was found near her living room couch, and shortly before Christmas, Ms. Ostrander found the other one under her dining room table and chairs. Ms. Ostrander recalled seeing Ozerson wearing them on the morning of the 10th.

As for the gun, the Ozerson home and neighborhood were searched extensively on December 10th and 12th, but it was not found. Firearms examiner Luczy had recovered several bullets from the wall and floor of the room where Ray's body was found. The bullets were .357 magnum bullets and had been shot from a .38 caliber revolver. There was evidence that Ray's gun was a .38 caliber revolver. Luczy and others went back to the Ozersons' previous residence, where Ray's gun-cleaning accident had occurred in 1979, and extracted a .38 caliber bullet from the ceiling. Officers also checked a gun belonging to Burt Kreisberg, but determined the bullets that killed Ray were not fired by his weapon.

Forensic pathologist Schnittker performed the autopsy and testified the cause of death was multiple gunshot wounds, four to the back, head, and chest. Death occurred between 7:00 and 8:00 a.m. on December 10th. Prosecutors advanced a theory that Ray had been shot twice in the back and then at closer range.

Ozerson denied guilt. A jury convicted her of second degree murder, and she was sentenced as noted.

At the parole hearing, Ozerson confirmed that an account she had given some years before remained accurate. She had stated that her husband was killed by an intruder. On the day of the offense, she had taken her dog for a walk and upon return between 7:30 and 8:00 a.m., entered her home through the back sliding door. She knew her husband was home because it was a weekday, and the car was still in the driveway. She saw a man standing in her den, looking toward the dining area. He appeared to be “a Spanish or Filipino” and wore dark clothing. He did not see her.

Ozerson immediately went to her neighbor’s house and called the police. The police arrived and told her they found her husband dead in the den where she had seen the intruder standing.

Ozerson ultimately admitted that for the last five years, off and on, she had been having an affair with another man. She had lied to her lover about leaving her husband, first saying she would leave Ray on December 8th, then on the 9th, and finally agreeing to leave him on the 10th, the day Ray was killed. Ozerson’s lover had badgered her, telling her that she was going to Switzerland with him. He purchased the tickets, then later told her he had returned the tickets. He bought the tickets again without her knowledge.

Ozerson stated she initially lied to the police, telling them that Kreisberg was a family friend and that she had not fired the gun the night before the killing. She stated that in the summer of 1986, Ray told her that he wanted to kill himself. He had expressed suicidal feelings before, and talked about suicide the night before he was killed. He told Ozerson she would be there when it happened. Ozerson took the gun with the intention

of throwing it in the garbage. Instead, she went to the grassy area in her backyard. The dog jumped into her arms, and she accidentally fired the gun into the air. The gun was a .38 caliber Smith & Wesson. After firing the gun, she walked into the house and placed it on a towel in the room. Her husband yelled, “the gun is dirty,” so she picked up her gloves, which were lying on a table in the den, and wiped the gun clean with them. She then placed the gun back in the towel. She said the gun was never found.

## **B. Social History**

Ozerson was born on September 19, 1953 and raised in Scotland. Her father died in 1999; her mother still lives there. She has an older brother who also lives in Scotland.

Ozerson attended school in Scotland, graduating high school and completing one year of college.<sup>5</sup> She met Ray in Boston and married him in 1975 in Great Britain, after which they moved to Germany, where Ray was stationed in the armed forces. Ozerson worked as a secretary for the United States Army in Nuremberg, Germany for three years. She also was enrolled in a masters degree program for two and a half additional years.

Upon arriving in the United States, Ozerson worked for an insurance company, selling policies.<sup>6</sup>

Ozerson has no juvenile criminal record. As an adult, she had one prior arrest for petty theft (she stole a carton of cigarettes). She was fined \$80. She has no history of illegal use of drugs or abuse of alcohol.

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<sup>5</sup> During the parole hearing, Ozerson agreed with the presiding commissioner’s statement that she had graduated college in Scotland with a business management degree, contrary to the information contained in the Probation Report.

<sup>6</sup> The Probation Report states she worked as a secretary for Transfer Insurance Company.

### C. Prison Record

Ozerson's classification score<sup>7</sup> is the mandatory minimum, 19. She received no "CDC 115's"<sup>8</sup> and only one "CDC 128-A."<sup>9</sup> The CDC 128-A—received ten years before the hearing—was for contraband food.

Ozerson participated in numerous self-help courses and therapy programs. She received a "chrono"<sup>10</sup> from Correctional Officer Little John, certificates of appreciation from Title and Change, Alanon, the Prison Pups Program, and for completing HIV and AIDS training. She also participated in the Life Long-Term organization, Children at

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<sup>7</sup> "'Prisoner classification scores play a significant role in determining where, within the state's many prison facilities, a prisoner will be sent to serve [his] term of incarceration. [Citation.] As a general rule, a prisoner's classification score is directly proportional to the level of security needed to house the inmate. . . . ' . . . [¶] When a male inmate is first received in the prison system, he is housed at a reception center where his case factors are evaluated (i.e., length of sentence, criminal history, behavior during prior and current terms, including escape history) and a standardized system is used to compute a classification score to determine his initial placement in one of the state's prisons or camps. (See [Cal. Code Regs., tit. 15,] §§ 3375.1–3375.3, subd. (a).) The score is recalculated at least yearly and may determine the necessity of subsequent prison transfers. ([*Id.*,] § 3375.4.)" (*In re Player* (2007) 146 Cal.App.4th 813, 823–824.) The mandatory minimum score for a life term inmate is 19. (Cal. Department of Corrections and Rehabilitation (CDCR), Department Operations Manual (DOM) (electronic ed. Dec. 31, 2006) Adult Parole Operations, §61010.11.5, pp. 465–466 [http://www.cdcr.ca.gov/Regulations/Adult\\_Operations/docs/DOM/Ch\\_6\\_Printed\\_Final\\_DOM.pdf](http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/Ch_6_Printed_Final_DOM.pdf) [as of June 23, 2009].) Scores of 52 and above require the highest level of security (level IV). (Cal. Code Regs., tit. 15, §3375.1, subd. (a)(4).)

<sup>8</sup> A CDC 115 documents misconduct believed to be a violation of law or otherwise not minor in nature. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(3); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

<sup>9</sup> A CDC 128-A documents incidents of minor misconduct. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray, supra*, 151 Cal.App.4th at p. 389.)

<sup>10</sup> "The CDC Form 128 series (chronos) are used by staff to provide progress reports on inmates." (CDCR, DOM, *supra*, § 72010.7.)

Risk Walkathon, and Toastmasters. Ozerson was involved in a 12-week psychotherapy group and was a tutor secretary for a program called Yes, I Can. She received a certificate from the Mexican American Resource Association (MARA) and participated in Victims Impact seminars, the Parenting program, Creative Conflict Resolution, Building Adequate Concepts with Life Plan for Recovery, Pathway to Wholeness, and Roots of Bitterness. She was a GED tutor and was involved in the Drug Awareness and Constant Relapse Prevention Program, Convicts Who are Women Versus Abuse seminars, Breaking Barriers, Narcotics Anonymous (NA), and Alcoholics Anonymous (AA). Ozerson also participated in Prison Fellowship Ministries, the Interfaith Chapel In-House Ministry, the Mentoring Outreach Program, drug awareness counseling (DAC), Anger Management, No More Colors, Introduction to Conflict and Information Skills, Canine Support Teams, and Time for Change Foundation.<sup>11</sup>

She also took courses in the School of Ministry, Biblical Studies and earned an Associate of Arts degree. Her keyboarding certificate shows she types 97 words per minute. She is certified in Advanced Office Services, Sight Safety, and Introduction to Windows using Microsoft Windows 2000, Advanced Services, as well.

Ozerson was employed at the prison as a clerk and received exceptional grades from her supervisors.

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<sup>11</sup> The names of several additional programs in which Ozerson participated are obscured by the transcriber's designation "(inaudible)."

#### **D. Psychological Evaluations<sup>12</sup> and Insight into Offense**

There are no psychological evaluations in the record. The Deputy Commissioner read into the record an addendum by the author of her 2005 psychological report, Dr. Smith, as follows:

“[O]n June 29, 2005, I received an inquiry from Inmate Ozerson concerning a[] comment of [*sic*] a report that I issued on June 10, 2005. Inmate Ozerson was concerned about my opening statements in section C under the review of life [crime] which reads, Inmate Ozerson does not express remorse in the sense that she does not admit to responsibility of [*sic*] her husband’s death or regret direct action that [led] to his murder. Inmate Ozerson was concerned that the statement could be misunderstood and asked for clarification.

“Acceptance of responsibility for the crime or remorse for the crime are often viewed as important indic[a]tors of suitability for parole. This is the reason that a section of the review of life crime outline which prescribes [the] way Board reports are to be written. Explicitly, as for comments concerning the existence of remorse, remorse is a deep, torturing sense of guilt held over a wrong that has been done, self-reproach. Remorse is sometimes used to communicate a lack of compassion in casual conversation, but [its] meaning in the context of the Board report is whether or not the individual being described has developed a lingering sense of responsibility and guilt that are appropriate

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<sup>12</sup> The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders, Text Edition (4th ed. 2000) setting forth all currently recognized mental health disorders and a comprehensive classification system. Generally, the classification system calls for information to be organized into five “axes” or dimensions to assist clinicians in planning treatment and assessing prognosis: (1) clinical disorders, (2) personality disorders, (3) medical conditions, (4) psychosocial and environmental problems, and (5) global assessment of functioning (GAF). (*Id.* at p. 27.) Using a point scale from one hundred down to one and organized into 10-point descriptive ranges, e.g., 90–81, 70–61, or 50–41, GAF scoring reflects higher functioning in the higher numbers. (*Id.* at p. 33.) Although we refer to the “DSM-IV” criteria, we recognize that the 2000 text edition of the manual is the authoritative source.

in our safeguards against the return of the kind of thinking and decision making that [led] to the crime in the first place.

“Inmate Ozerson, as I explained, does not admit to the murder of her husband. She does not admit to involvement [in] any conspiracy or taking any direct course of action that foreseeable[y led] to his murder. She does express a credible sense of regret and loss over his death. Saying that she has no remorse is not meant to infer that she is pitiless or callous in relation to the murder of her husband. Asymmetrically, a person cannot be remorseful over something they conten[d] they did not do. In discussing my comments with Inmate Ozerson on June 29, 2005, she remarked that she has had a suspicion over the years, that is without any evidence or proof, that her extramarital affair may have played some role in motivating the individual who actually murdered her husband. She does not know this for certain. It may be that the extramarital affair is unrelated in any way to her husband’s death, and yet the two circumstances are associated in her mind. Inmate Ozerson does feel remorseful about having participated in the extramarital affair which was occurring prior to the murder of her husband.

“My opinion concerning the psychological factors that bear on this woman’s suitability for parole [are] as described on pages four through six on my report. As I have stated previously, the li[k]elihood of this woman becoming dangerous to the community should she obtain a release from custody would be considered low to very low.”

The Deputy Commissioner indicated that Dr. Smith’s diagnostic impressions per the DSM-IV criteria were Axes I and II: no diagnosis; Axis III: migraine headaches and psoriasis; and Axis IV: stressors of incarceration. Ozerson’s GAF score was 85 (on a 100-point scale).

The Deputy Commissioner continued reviewing and reciting portions of the psychological report:

“Relevance of mental condition to life crime, criminal behavior at the time the murder was committed. Inmate Ozerson was not suffering from any mental illness or drug related disorder according to the history she provides. Inmate (inaudible) and remorse. Inmate, well, I think that’s been covered too, in the addendum. Cognitive

factors, it is not possible to address positive factors as Inmate Ozerson contends she did not commit the crime. Assessment of dangerousness within a controlled setting, history reflected in the central file covering Ozerson's incarceration at [California Institution for Women] since 1987 indicates that she generally conducts herself in a compliant, safe and non-violent manner within this controlling setting. There is no documentation whatever of interpersonal conflict, altercations o[r] other indications of violent and intimidating behavior. And it gives a risk assessment (inaudible), his summary reads as follow[s:] After interview[ing] Inmate Ozerson and having reviewed a central file and unit health record, it is concluded this inmate is mentally stable. There is no history of recent dangerousness, disciplinary violations or documented problems with peers or staff relations. There is no immediate threat of dangerousness should Inmate Ozerson be released to the community. This woman has a favorable risk profile for release to the community. That is, dangerousness is not reasonabl[y] foreseeable should she be released from custody. Historical (inaudible) of violent risk suggest this woman's risk of becoming dangerous in a community after released from custody would be considered low to very low. I am fully supportive of a release in accordance with the psychological and risk assessment. And finally, Inmate Ozerson has matured beyond the age of the highest violen[ce] risk and her accomplishment in custody has been (inaudible)."

The Presiding Commissioner (PC) asked Ozerson more questions about her opinion that her affair may have had something to do with her husband's death, as follows:

"[PC]: [W]hat caused that revelation?

"[Ozerson]: What caused that was the fact that Mr. Kreisberg would visit me here in the prison when I first came here. And he told me an entirely different story or he answered my questions entirely differently than he answered them on the stand[.]. And I questioned him and he still answered me—lied to me and what he said on the stand. Because when I got my transcripts, I diligently looked through every page and everything I asked him at the time, he took a different story and he lied to me.

"[PC]: With regard to what?

“[Ozerson]: Just everything he said. Many things he said. One, for instance, was when he would take a trip, the first thing I did when I got to a phone booth was I called my husband. I brought home gifts for my husband, for friends and just little things that added up to horrendous lunacies that I was doing. I wasn’t telling the truth and he told me a completely different story. All the time it was a different story.

“[PC]: What specific things lead you to believe that he might be responsible for your husband’s death?

“[Ozerson]: Well, through the years when my husband said he wanted to commit suicide, he said he didn’t care what happened to him, let him kill himself. And I discussed this with him from July until he was dead just about. He didn’t want to hear it. Basically, he didn’t care. So—

“[PC]: That was something that existed before, correct? When you told him about that before, he indicated that he didn’t care what happened to your husband?

“[Ozerson]: Correct.

“[PC]: Okay. So now, what was it about what he was saying that led you [to] believe that he might be responsible for your husband’s death?

“[Ozerson]: What he was saying then was the fact that he didn’t care and the fact afterwards, as I said, when I received my transcripts, it was all, whatever he said on the stand, whatever he told me here, completely opposite.

“[PC]: And this occurred sometime between the 10th of June in 2005 and the 30th of June 2005? Because as of the original report on 6/10/05, there was no mention [in] the psychological report of anything to do with this gentleman in terms of your husband’s death.

“[Ozerson]: Perhaps they didn’t ask me about it. Yeah, I don’t think they asked me about it.

“[PC]: Roughly, when was this visit, I don’t expect a day, but just generally, when did this visit occur that gave you the idea that somehow this gentleman was responsible for your husband’s death?

“[Ozerson]: Well, visit? How did I come about to feel that way?

“[PC]: Yes.

“[Ozerson]: Maybe a year after I came here when I, after I got the transcripts and I tried to talk to him about it. He told me he drove—he told me personally, the morning of my husband’s death, he drove around my house seven times. He took the stand and he said he drove around once or twice. Then I asked him again about it and he lied again. Just a lot of things.

“[PC]: Okay, but this was the year after you arrived here?

“[Ozerson]: [Y]es.

“[PC]: And when was the first time that you ever mentioned this to anyone?

“[Ozerson]: How I felt that he may be involved?

“[PC]: Correct.

“[Ozerson]: Oh, I can’t remember. Through the years. Through the years.

[¶] . . . [¶] My parents, my relatives, his close friends all told me they felt it was him. His close friends he’s had since childhood in the 30’s are no longer his friends. Through certain things they speak to him about in turn said to them they feel that he was responsible for my husband’s death.

“[PC]: Prior to this conversation, after you were here for about a year, was there any time when he ever mentioned anything like this or any threats of any kind?

“[Ozerson]: Towards my husband?

“[PC]: Correct.

“[Ozerson]: No, just with the exception that he didn’t care what happened to him, he can die and fall into the hole, he doesn’t care.

“[PC]: [H]e wasn’t the man that you saw inside the house?

“[Ozerson]: Oh, no, definitely not. No, he was not. No.”

The Deputy Commissioner (DC) continued the questioning:

“[DC]: At some [point] when you had a belief that this other individual may have been involved in your husband’s murder, did you ever inform your suspicions to the D.A.’s office?

“[Ozerson]: No, I didn’t think I had an option at the time. I didn’t know how the system work[ed], I had no idea. I shared it with family and friends who in turn felt the same way. I shared it with long-time friends and had written in the . . . past when I came here that they also felt that. And the man who heard the gunshot the night before has written year after year after year to contend that this is what he heard.

“[DC]: . . . Never did it cross your mind that you couldn’t have mentioned it to the D.A.’s office.

“[Ozerson]: To write to the D.A.’s office, no, it never crossed my mind. I didn’t know at the time. [¶] . . . [¶]

“[DC]: Did that individual ever make any direct comments to you about him being involved?

“[Ozerson]: Kreisberg?

“[DC]: Yes.

“[Ozerson]: No, he said he was actually glad he was dead. He told me that I would walk out of here on appeal, they would believe me, he would take it directly to the governor, many false statements he made. [H]e knew in his heart I wasn’t guilty, and I asked him, how do you know in your heart, how do you know I didn’t do this. And he said he knows, he knows.”

As for making amends, Ozerson stated at the hearing that she wrote to her former in-laws, but received no reply.

#### **E. Parole Plans**

Ozerson plans to reside with Bob and Nora Fitch in Thousand Oaks. The Fitches and other members of their church will provide transportation and financial and personal support such as food and new clothing. As backup options, she has support and a place to stay with Crossroads.

Approximately 90 letters of support were sent to the Board, including from the Prison Pup Program. Ozerson’s mother sent a letter. The Board referred by name to approximately 65–70 other letter writers. She also received a letter from Correctional

Lieutenant Michael Crenot, one of her supervisors, who wrote to thank her for the years she was his clerk.

She has four job offers. Dr. Bradshaw, the senior pastor of North Coast Church in Vista, offered her a position. She has offers from Dr. Dawson in Thousand Oaks and Debbie Ludwig, as well as from Dale Richmore, a pastor from Thousand Oaks. Dr. Dawson offered Ozerson a position in the front office making appointments and checking people in and out, starting at \$15 per hour. Debbie Ludwig of Moulton Associates offered Ozerson a position as administrative marketing assistant in the Glendale office, which would pay between \$15 and \$18 per hour. Dale Richmore wanted to interview Ozerson for an administrative assistant position at the church. The position pays \$30,000 a year.

#### **F. District Attorney's Position on Parole**

The District Attorney "strongly opposed" a grant of parole. The Los Angeles Police Department opposed Ozerson's parole.

#### **G. Board Decision**

On April 25, 2007, the Board found Ozerson not suitable for parole based on the commitment offense and on the fact that her claim of an intruder was not supported by evidence. As to the latter issue, the Board stated:

"This brings up the issue before the Panel of the level of the understanding for the triggers that lead a person with no documented violent history to be convicted of a crime requiring this level of violence. This leads the Panel to the next conclusion that without such an understanding that she does represent, or continue to represent a risk despite the psychological evaluation which depends largely on input from Ms. Ozerson, and that she does remain a risk."

#### **H. Habeas Corpus Proceedings**

Ozerson filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on August 16, 2007. On October 26, 2007, the court denied the petition, concluding the record contained some evidence to support the Board's unsuitability

finding. In particular, the court stated the motive for the murder was inexplicable, quoting the Board's view that Ozerson committed the murder "'for reasons still best known to herself.'" As her actions could not be explained, "there is some evidence she is unusually unpredictable and dangerous." In addition, the court found there was some evidence to support the Board's finding that the offense was carried out in a manner that demonstrated exceptionally callous disregard for human suffering because the victim was vulnerable due to his disabilities, and Ozerson shot him several times such that the murder was "more violent and aggravated than ordinary." Also, there was some evidence that Ozerson did not understand the nature and magnitude of the offense. Her version of events was not supported by the evidence, and she demonstrated no remorse for her husband's murder. Further, "[b]ecause petitioner has not gained insight into the nature of her offense, she continues to be a risk of danger to society."

Ozerson filed a petition for writ of habeas corpus in the Court of Appeal on January 3, 2008. We requested opposition, then issued an order to show cause and set a briefing schedule and hearing date. On June 26, 2008, we granted respondent's request for a stay pending the outcome of several cases then pending before the California Supreme Court. On December 2, 2008, we vacated the stay and set a new briefing schedule and hearing date. We asked the parties to address *In re Lawrence* (2008) 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241, in their submissions. The parties waived argument, and the matter was submitted on April 22, 2008.

## **DISCUSSION**

Ozerson contends the Board's decision is arbitrary because it found her suitable for parole in 2004, then unsuitable in 2005 and in 2007 based on the identical circumstances. Ozerson further contends the Board's 2007 decision was not supported by some evidence because the Board failed to establish a nexus between the commitment offense and the conclusion that she currently poses an unreasonable risk of danger to society if released on parole.

## A. Governing Law

The purpose of parole is to help prisoners “reintegrate into society as constructive individuals as soon as they are able,” without being confined for the full term of their sentence. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [92 S.Ct. 2593].) Although a prisoner has no constitutional or inherent right to be conditionally released before the expiration of his sentence (*Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 7 [99 S.Ct. 2100]), in this state, Penal Code section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause. (*In re Lawrence, supra*, 44 Cal.4th at p. 1205 [“petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate’s due process right ‘cannot exist in any practical sense without a remedy against its abrogation,’” quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664]; *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 914–915.)<sup>13</sup>

Section 3041, subdivision (b), establishes a presumption that parole will be the rule, rather than the exception, providing that the Board “shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed . . . .” (See *Board of Pardons v. Allen* (1987) 482 U.S. 369, 377–378 [107 S.Ct. 2415] [unless designated findings made, parole

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<sup>13</sup> All references to section 3041 are to that section of the Penal Code. Section 3041, subdivision (a), provides as relevant: “One year prior to the inmate’s minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime.”

generally presumed to be available].) “[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1211; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846, 850 [section 3041 vests “California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause”].)

When assessing whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the panel considers all relevant, reliable information available on a case-by-case basis. The regulations set forth a nonexclusive list of circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).) Factors tending to indicate suitability include: (1) absence of a juvenile record, (2) stable social history, (3) signs of remorse, (4) significant life stress motivated the crime, (5) battered woman syndrome, (6) no significant history of violent crime, (7) inmate’s age, (8) realistic plans for the future, and (9) institutional behavior. (*Id.*, § 2402, subd. (d).) Circumstances tending to show unsuitability include: (1) commitment offense was committed “in an especially heinous, atrocious or cruel manner,”<sup>14</sup> (2) previous record of violence, (3) unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated. (*Id.*, § 2402, subd. (c).) “In sum, the Penal Code and corresponding

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<sup>14</sup> The regulation specifies the factors to be considered in determining whether the offense was committed in an especially heinous, atrocious or cruel manner as: “(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense.” (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

regulations establish that the fundamental consideration in parole decisions is public safety.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.)

The “core determination” thus “involves an assessment of an inmate’s *current* dangerousness.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1205, original italics.) The Board is authorized “to identify and weigh only the factors relevant to predicting ‘whether the inmate will be able to live in society without committing additional antisocial acts.’” (*Id.* at pp. 1205–1206, quoting *In re Rosenkrantz, supra*, 29 Cal.4th at p. 655.) “[D]irecting the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate’s threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law.” (*Id.* at p. 1219.) As a result, the “statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*Id.* at p. 1211.) The Board can, of course, rely on the aggravated circumstances of the commitment offense [among other factors] as a reason for finding an inmate unsuitable for parole; however, “the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or post-incarceration history, or . . . her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from . . . her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*Id.* at p. 1214, original italics.)

## **B. Standard of Review**

“[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some

evidence confirms the existence of certain factual findings.” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212, original italics.) The standard is “unquestionably deferential,” and “‘limited to ascertaining whether there is some evidence in the record that supports the [Board’s] decision.’” (*Id.* at p. 1210.) Nonetheless, the standard “certainly is not toothless, and ‘due consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Ibid.*) Our inquiry thus is “not merely whether an inmate’s crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board.” (*Id.* at p. 1221, original italics.) The Board or Governor must articulate a “rational nexus” between the facts of the commitment offense and the inmate’s current threat to public safety. (*Id.* at pp. 1226–1227 [finding no evidence supported Governor’s determination that Lawrence remained a threat to public safety in view of her “extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board”]; *In re Ross* (2009) 170 Cal.App.4th 1490, 1497 [88 Cal.Rptr.3d 873, 890] [Governor’s written decision flawed because it contained no explicit “ ‘articulation of a rational nexus between th[e] facts and current dangerousness’”].)

## **C. Analysis**

### **1. The Board’s Previous Suitability Findings**

Ozerson contends the Board of Parole Hearings has “shown a pattern of arbitrary and capricious behavior in regard to [her] suitability. Finding [her] suitable one year and then unsuitable the next on the basis of exactly the same evidence shows a pattern of behavior that is both arbitrary and capricious.” Ozerson cites no authority for this argument.

There is no doubt, of course, that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” (*Wolff v. McDonnell* (1974) 418 U.S. 539, 558 [94 S.Ct. 2963, 2976].) The California Supreme Court reiterated in *In re Rosenkrantz* that a Board decision without any basis in fact “would be arbitrary and capricious, thereby depriving the prisoner of due process of law.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 657.) But the fact that different Boards and governors may reach different decisions while considering the same factors does not, in and of itself, establish arbitrariness. These are discretionary decisions, and although the Board and Governor must consider the same factors, the Governor may weigh those factors differently than the Board might. (See *In re Lee* (2006) 143 Cal.App.4th 1400, 1408 [“[Governor] has the discretion to be ‘more stringent or cautious’ in determining whether a defendant poses an unreasonable risk to public safety,” citing *In re Rosenkrantz, supra*, 29 Cal.4th at p. 686].)

Due process does not guarantee Ozerson a particular result. “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” (*Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895 [81 S.Ct. 1743, 1748]; *In re Minnis* (1972) 7 Cal.3d 639, 649.) Our charge is to examine whether there is an evidentiary basis for the Board’s 2007 decision—the only decision properly before us.<sup>15</sup> Ozerson’s responsibility is to “prov[e] the factual allegations that serve as the basis for . . . her request for habeas corpus relief. [Citation.]” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 675.) As explained in the next section, she has not done so.

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<sup>15</sup> To the extent Ozerson purports to challenge either the Governor’s 2004 reversal of the Board’s suitability decision or the 2005 Board decision finding her unsuitable for parole, she has not submitted any supporting documentation (e.g., the complete hearing transcripts, psychological evaluations, or Life Prisoner Evaluation Reports. She also has not explained why she did not challenge these Board decisions until now. In any event, we review only the 2007 Board decision here.

## 2. “Some Evidence” Supported the Board’s Finding of Unsuitability

The California Supreme Court clarified the Board’s obligation to articulate a “rational nexus” between the facts of the commitment offense and the inmate’s current threat to public safety when relying solely on the commitment offense. (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1226–1227.) Where, however, the Board finds a petitioner unsuitable for parole based on the gravity of the offense *and* on a “lack of insight into his long history of violence,” the Supreme Court has stated these are “factors that suggest petitioner remains a current danger to the public.” (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1261.) In that case, the record “amply supported” the Governor’s conclusion. Unlike *Lawrence* (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1193 [“petitioner had no prior criminal record as a juvenile or as an adult”]), *Shaputis*’s commitment offense was not “an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur.” (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1259.) The murder was “the culmination of many years of petitioner’s violent and brutalizing behavior toward the victim, his children, and his previous wife.” (*Ibid.*) *Shaputis* stated his conduct was ““wrong”” and felt some remorse for the crime. But he “*still* claims the shooting was an *accident*.” (*Id.* at p. 1260.) The Supreme Court acknowledged that “expressions of insight and remorse will vary from prisoner to prisoner and that there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.”<sup>16</sup> (*Id.* at p. 1260, fn. 18.) In *Shaputis*, the Supreme Court concluded the Governor properly relied on evidence in the record in the form of “both . . . petitioner’s own statements at his parole hearing characterizing the commitment offense as an accident and minimizing his responsibility for the years of violence he inflicted on his

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<sup>16</sup> In fact, a prisoner does not have to admit guilt (Pen. Code, § 5011, subd. (b)) and “may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner.” (Cal. Code Regs., tit. 15, § 2236.)

family, and . . . recent psychological evaluations noting petitioner's reduced ability to achieve self-awareness." (*Ibid.*) The Governor's decision was thus supported by some evidence: "not merely because the crime was particularly egregious, but because petitioner's failure to take full responsibility for past violence, and his lack of insight into his behavior, establish that the circumstances of petitioner's crime and violent background *continue* to be probative to the issue of his *current* dangerousness." (*Id.* at p. 1261, fn. 20.)

Turning to Ozerson's circumstances, she has no criminal record other than the commitment offense and has no history of violent behavior. Ozerson also has abundant support in the community. Her institutional record is exemplary. Had the Board relied solely on the commitment offense, it would be a relatively straightforward matter to review the record to determine whether the Board had articulated a rational nexus between the life crime and the Board's finding that she posed an unreasonable risk of danger to society.

Here, however, the Board also relied on Ozerson's lack of insight and her absence of remorse. The Board cannot require her to admit guilt in order to gain parole. (Pen. Code, § 5011, subd. (b).) Nor can Ozerson's refusal to admit guilt or discuss the facts of the crime be held against her. (Cal. Code Regs., tit. 15, § 2236.) The Board must, though, consider her "past and present attitude toward the crime" (*Id.*, § 2402, subd. (b)), including whether she "performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that [s]he understands the nature and magnitude of the offense." (*Id.*, subd. (d)(3).)

Before reaching the specific issues of insight and remorse, the Board examined Ozerson's attitude toward her husband's murder. As discussed above, there was considerable testimony at trial from one of the detectives about his observations of the Ozerson residence and how these findings compared to his experience in investigating other residential burglaries. The anomalies were numerous: the wet grass bore no footprints; there was no evidence of forced entry; the decedent still had his jewelry and

cash; the items from the briefcase arranged around the body in a circle appeared to be staged; there was no evidence of any tampering with the stereo or televisions; Ozerson's jewelry was still in her bedroom, untouched; there was no evidence of an "exit plan;" and the number of gunshots exceeded the number typically fired by a fleeing burglar. No gunshot residue was found on one of Ozerson's pairs of gloves, but another pair, which turned up individually at different times after the crime at a neighbor's house, did test positive for the residue. The evidence of Ozerson's affair with Kreisberg did not bolster her account of an intruder: they had been together for five or so years; she told Kreisberg she had decided to leave her husband for him; Kreisberg purchased airline tickets to Switzerland for the two of them; the day she told Kreisberg she would leave Ray was the day he was murdered. And her much belated revelation of a purportedly long-held suspicion that *Kreisberg* may have been involved in Ray's murder was demonstrated during the hearing to lack any supporting evidence. Ozerson's version of events plainly lacked evidence.

The Board found her claim of an intruder contrary to the trial evidence and lacking in credibility, which raised "the issue before the Panel of the level of the understanding for the triggers that lead a person with no documented violent history to be convicted of a crime requiring this level of violence." Without such an understanding, the Board felt she remained a risk "despite the psychological evaluation which depend[ed] largely on input from Ms. Ozerson." We do not reweigh the evidence. Rather, we assess whether *some* evidence supports the Board's determination that the circumstances of the commitment offense and Ozerson's lack of insight and remorse established that she currently poses an unreasonable risk of danger to society if released on parole. We conclude some evidence does support the Board's decision and therefore deny the petition.<sup>17</sup>

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<sup>17</sup> Our opinion is limited to deciding that some evidence supports the Board's decision. It is not, of course, meant to suggest how the Board must decide Ozerson's

**DISPOSITION**

The petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

WEISBERG, J.\*

I concur:

MALLANO, P. J.

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case in the future. At future hearings, the Board may reach a different conclusion as to her current dangerousness.

\* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ROTHSCHILD, J.

I respectfully dissent.

The issue in this case is whether “some evidence” supports the Board’s conclusion that petitioner, Elizabeth Ozerson, “poses a current threat to public safety.” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191.) Applying that standard in a highly deferential manner, as we must, I nonetheless conclude that no evidence supports the Board’s finding that Ozerson remains a threat to public safety.

Ozerson was convicted of the second degree murder of her husband but has maintained her innocence of the crime throughout the years. In 2004, the Board granted her parole but the Governor overturned the decision. As of her last parole hearing in 2007 she was 54 years old and had been incarcerated for over 20 years. Prior to her conviction, Ozerson had no history of violence. She has been a model prisoner, earned a degree in prison and participated in numerous self help programs as well as programs to help other prisoners. She received exceptional grades from her prison employment supervisors. She has multiple job offers upon release, including one from her pastor and a physician, and at least 90 letters of support from the community. The psychologist who assessed her suitability for parole reported that the likelihood that she would be a danger to the community if she were released was low to very low, and unqualifiedly recommended her release. Her preconviction history, her performance in prison, and her prospects for the future are at least equivalent to those of the defendant in *In re Lawrence, supra*, and many other prisoners who, through court process, have won reversal of their parole denials. The following cases are illustrative.

Sandra Lawrence spent 23 years in prison for the first degree murder of her lover’s wife. During that time “she was free of serious discipline, except for two administrative violations for being late to work assignments, and several other instances of being counseled for administrative violations that did not result in discipline. Within a year of her incarceration, she was placed in Miller A Honor house, housing reserved for discipline-free inmates. She worked as a plumber for the prison and volunteered as a tennis coach for other inmates. She was a charter member of the Yes-I-Can tutorial

program, a member of Toastmasters International and the Friends Outside parenting program, and a physical trainer for other inmates. [Lawrence] earned a bachelor's degree in computer science from the University of La Verne, and was described by prison staff as a 'team player who interacts with everyone in a courteous manner.' [¶] . . . [¶] . . . In total, five psychologists conducting 12 separate evaluations since 1993 concluded that petitioner no longer represented a significant danger to public safety. (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1194, 1195.)

John Dannenberg spent 23 years in prison for the second degree murder of his wife. His social history, prison conduct and psychological evaluations parallel Ozerson's. Dannenberg had never committed a crime other than the murder. His social history was "extremely stable," and he remained close to his family throughout his incarceration. The psychological reports repeatedly found that he did not suffer from any mental problems. His prison record was spotless, and he made realistic and solid parole plans. Like Ozerson, Dannenberg spent his time in prison acquiring new skills and additional education, and employing his skills and education in numerous valuable jobs. His work, like Ozerson's, was repeatedly praised by prison officials. (*In re Dannenberg* (2009) 173 Cal.App.4th 237, 253-254.)

Darin Palermo spent 22 years in prison for the second degree murder of his former girlfriend. He had no prior criminal history. While in prison he received only three disciplinary write-ups, all for nonviolent and relatively minor misconduct; he effectively participated in rehabilitative programs; psychological evaluations opined that he no longer represented a danger to public safety if released on parole; he had job skills and job offers if released; and he had a supportive family willing to ease his transition back into society. (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1112.)

#### A. Ozerson's Refusal to Admit Guilt

The Board justified its denial of parole on the ground that Ozerson has shown a lack of insight and absence of remorse, which in turn shows that she would be a danger to society if released from prison. Both the conclusion that Ozerson lacked insight and

remorse and the conclusion that she would be a danger to society if released are based on the sole fact that Ozerson continues to refuse to admit that she is guilty of killing her husband, a fact on which neither the Board nor this court is entitled to rely in deciding whether parole is warranted. Penal Code section 5011, subdivision (b), states that in determining eligibility for parole the Board “shall not require . . . an admission of guilt to any crime for which an inmate was committed . . .” (Cf. *In re Palermo*, *supra*, 171 Cal.App.4th at pp. 1110-1111 [denial or parole reversed where court was “not persuaded” that Board’s concerns about inmate’s “insight” were not an “indirect” “requirement he admit he is guilty of second degree murder”]; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491 [an inmate ““need not admit his guilt or change his story to be found suitable for parole by the Board””].)

The record reflects that the only basis for the Board’s denial of parole to Ozerson is that Ozerson refused to admit that she is guilty of the crime for which she was convicted. Thus, in finding that Ozerson lacked insight the Board cited her insistence that an intruder killed her husband. The Board stated: “The claim of the intruder is not supported by evidence of witnesses or forensic evidence. This brings up the issue before the Panel of the level of the understanding for the triggers that lead a person with no documented violent history to be convicted of a crime requiring this level of violence. This leads the Panel to the next conclusion that without such an understanding that she does represent, or continue to represent a risk . . .” The Board’s decision violated section 5011 subdivision (b).<sup>1</sup>

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<sup>1</sup> I recognize that in *In re Shaputis* (2008) 44 Cal.4th 1241, 1260, the court cited Shaputis’ continued insistence that he shot his wife accidentally as one of the grounds supporting the denial of parole. But that was not the only ground for denying Shaputis parole. As the court explained, Shaputis’ claim that the shooting was an accident “considered with evidence of petitioner’s history of domestic abuse and recent psychological reports reflecting that his character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative ‘programming,’ all provide some evidence in support of the Governor’s conclusion that petitioner remains dangerous and unsuitable for parole.” (Fns. omitted.)

B. Absence of a Rational Nexus Between the Refusal to Admit Guilt and Current Dangerousness

The Board's decision also violates the requirement that the evidence establish "a rational nexus between [the] facts and current dangerousness." (*In re Lawrence, supra*, 44 Cal.4th at p. 1227.) The only evidence before the Board, other than Ozerson's refusal to admit guilt, demonstrates that no rational nexus exists between her claim of innocence and the finding that she would be a danger to the community.

Dr. Smith, the psychologist who examined Ozerson at least twice in connection with his reports, and the only psychological expert to give an opinion, found no such "rational nexus." Smith knew that Ozerson denied guilt but nevertheless concluded "this woman's risk of becoming dangerous in a community after [release] from custody would be considered low to very low"; "[t]here is no immediate threat of dangerousness should Inmate Ozerson be released to the community"; and "dangerousness in not reasonabl[y] foreseeable should she be released from custody."

The report by Dr. Smith also expressly addressed the issue of Ozerson's refusal to admit guilt as evidence of lack of remorse. He stated, simply, that she cannot be expected to express remorse in the sense of accepting responsibility and guilt over the death of her husband because "a person cannot be remorseful over something they conten[d] they did not do." He went on to explain that "[s]aying that she has no remorse is not meant to infer that she is pitiless or callous in relation to the murder of her husband"; and, further, that "[s]he does express a credible sense of regret and loss over his death." No evidence at the parole hearing contradicted Dr. Smith's assessment of Ozerson's sense of appropriate remorse. Nothing in the report or in the record before the Board supports its conclusion to the contrary or that the nature of Ozerson's remorse makes her a danger to the public if released from prison.

### C. Arbitrary Rejection of Dr. Smith's Report

The Board rejected Dr. Smith's undisputed report on the ground that it depended "largely on input from Ms. Ozerson." The Board's rejection of Dr. Smith's report on the basis that it relied "largely" on input from Ozerson lacks a rational justification. Nothing in Dr. Smith's report supports the conclusion that he failed to consider all relevant information including Ozerson's claim of innocence and her theory for the crime, or that he relied disproportionately on input from Ozerson. In any case, in order to responsibly fulfill his assignment, Dr. Smith would have had to obtain information directly from Ozerson. Nothing in the records supports the rejection of Dr. Smith's expert opinion. That is not to say that the Board must always accept an expert's psychological opinion, but it cannot reject that opinion arbitrarily or irrationally. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1568.) The casual dismissal of a psychologist's report on the ground that it depends largely on input from the patient is an arbitrary and irrational rejection.

For the reasons given above, I would grant Ozerson's petition for a writ of habeas corpus and order the Board to hold a new hearing and find her suitable for parole unless new evidence of unsuitability arising subsequent to the April 2007 hearing is introduced and is sufficient to support a finding that she currently poses an unreasonable risk of danger to society if released on parole.

ROTHSCHILD, J.